BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	
	)	
and	)	CC Docket No. 96-149
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

COMMENTS
OF SBC COMMUNICATIONS INC.

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Comments of SBC Communications Inc.
CC Docket No. 96-149

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Summary

The Commission's stated focus in this proceeding is on the non-accounting BOC separate affiliate and nondiscrimination safeguards that Congress prescribed in the 1996 Act to foster the development of robust competition in all telecommunications markets. As with virtually all of its actions relating to the implementation of the 1996 Act, the Commission quotes express Congressional intent "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." The Commission's charge under the Act is the implementation of the 1996 Act through a de-regulatory approach.

Virtually every question, every issue, and every concern that the Commission raises in the NPRM has not only been debated repeatedly in Commission proceedings in the last 25 years, but was also debated and discussed within the legislative process that culminated in the passage of the 1996 Act, which was the result of a three-year Congressional effort. Congress struck a balance: separate affiliates were required for a limited period of time, antidiscrimination safeguards were adopted, and joint marketing was authorized. The Commission's duty is to enforce the Congressional standards, to effectuate the 1996 Act's principles in support of competition, de-regulation, and the "opening [of] all telecommunications markets to competition."

The Commission has accepted the premise that consumers need the ability to acquire and pay for telecommunications services in a simple "one-stop" manner. The 1996 Act directs that BOCs and other service providers be able to provide such "one-stop" service via joint marketing. At issue is whether the Commission's rules will acknowledge and respect consumer (and Congressional)

expectations, or whether the Commission will dictate that consumers make "multiple stops" to acquire the telecommunications services they desire, under the guise of ensuring that distinct corporate entities can only be considered sufficiently separate if they meet standards set by the Commission in 1980 in the context of the nascent computer industry.

Furthermore, the Commission has repeatedly expressed confidence in its existing safeguards. Overall, the Commission's collective safeguards have proven sufficient to allay discrimination concerns in the new competitive environment. These Commission's non-structural safeguards have worked well for LECs for over eight years and can continue to work well in the structures required by the 1996 Act.

BOC affiliates should be permitted to compete, as do all other carriers, on a non-dominant basis. Congress' intent in enacting the 1996 Act was to facilitate the entry of competitors to both the local exchange market and to the interexchange market as well. To the extent that the Commission's potential dominant carrier regulations delay or impede a BOC affiliate's efficient provision of interexchange services after it is permitted to offer services through completion of the Section 251, 252, 271, and 272 requirements, they are contrary to Congressional intent and anticompetitive in result. The Commission should not, therefore, regulate separate BOC affiliates as dominant in their provision of interstate, interexchange services.

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COMMENTS OF SBC COMMUNICATIONS INC.[1]

I. INTRODUCTION

The Commission's stated focus in this proceeding is on the non-accounting BOC separate affiliate and nondiscrimination safeguards that Congress prescribed in the Telecommunications Act of 1996 (the 1996 Act)[2] to foster the development of robust competition in all telecommunications

[1]SBC Communications Inc. (SBC) files these Comments by its attorneys and on behalf of its subsidiaries, including Southwestern Bell Telephone Company (SWBT), Southwestern Bell Communications Services, Inc. (SBCS), and Southwestern Bell Mobile Systems, Inc. (SBMS) in response to the Commission's Notice of Proposed Rulemaking released on July 18, 1996 (the NPRM). SBC also adopts and supports the comments of United States Telephone Association.

[2]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, to be codified at 47 U.S.C. §§ 151 et seq. (all citations to the 1996 Act will be to the 1996 Act as it will be codified in the United States Code). The 1996 Act amended the Communications Act of 1934 (Communications Act).

markets.[3] As with virtually all of its actions relating to the implementation of the 1996 Act, the Commission quotes express Congressional intent "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[4]

After this initial use of the word "de-regulatory" in the NPRM, the Commission pays little heed to Congress' deregulatory objectives. Congress intended and explicitedly legislated that the telecommunications market is to be balanced and competitive overall. Should the Commission adopt the sort of rules suggested in the NPRM, the deregulatory and procompetitive goals of Section 272 of the 1996 Act would be subverted. The Commission's charge under the Act is the implementation of the 1996 Act, using a de-regulatory approach. The Commission has the authority and the responsibility under the Communications Act to enforce and implement the requirements included in Section 272, but it is not authorized to adopt rules that expand the requirements of Section 272.

Virtually every question, every issue, and every concern that the Commission raises in the NPRM has not only been debated repeatedly in Commission proceedings in the last 25 years but was also debated and discussed within the legislative process that culminated in the passage of the 1996 Act, which was the result of a three-year Congressional effort. Congress was lobbied to include in

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[3]NPRM at ¶ 3.

[4]NPRM at ¶ 1. See Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess, Preamble (1996) (Joint Explanatory Statement); see also 47 U.S.C.§ 706(a) (encouraging the deployment of advanced telecommunications capability to all Americans).

its legislation more strenuous structural separation requirements, more stringent safeguards, and an absolute prohibition of joint marketing. Congress debated those proposals and declined to do each of these things, choosing instead to prescribe specific mechanisms to permit the BOCs and their affiliates to provide meaningful competition. Congress struck a balance: separate affiliates were required for a limited period of time, antidiscrimination safeguards were adopted, and joint marketing was authorized. These three principles of Section 272 were meant to be equally effectuated, and any regulation that limits or weakens them is inconsistent with Congressional intent.

As the Commission points out,

> Enactment of the 1996 Act opens the way for BOCs to provide interLATA services in states in which they currently provide local exchange and exchange access services. Their provision of such interLATA services offers the prospect of increasing competition among providers of such services. BOCs can offer a widely recognized brand name that is associated with telecommunications services, the ability for consumers to purchase local, intraLATA and interLATA telecommunications services from a single provider (i.e., 'one-stop shopping'), and other advantages of vertical integration. Similar benefits could follow from BOC provision of interLATA information services and BOC manufacturing activities.[5]

However, while the Commission recites Congressional policy, the regulations it proposes through the NPRM would not increase competition.

The NPRM in this proceeding goes far beyond mere "implementation" of the 1996 Act. Instead, it expands upon the specific structural separation requirements of Section 272 in a manner never contemplated by Congress. If Congress had intended a more detailed set of separation rules for BOC provision of interLATA services -- such as that set forth within Section 274 regarding BOC involvement with electronic publishing -- then Congress would have written such requirements into

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[5] NPRM at ¶ 6.

Section 272. The fact that Congress did not include such draconian rules must mean that Congress intended that Section 272 be implemented as it was written.

Section 272 contains only eight subsections -- each one of which is direct and unambiguous and should not be subject to arbitrary redefinition, especially in light of the Commission's recognition that Congress intended for the 1996 Act to be deregulatory. The structural safeguard requirements are truly simple, straightforward legislative requirements. In implementing Section 272, the Commission should give effect to the following principles:

- When an RBOC provides interLATA services in its "traditional" local exchange territory and/or engages in manufacturing (fabrication), those activities must be conducted in such a way as to be separate from that entity which is engaged in the provision of local exchange service.

- The framework of structural separation should be limited to that which is provided for in the legislation so that the 1996 Act's deregulatory provisions, such as joint marketing, survive intact.

- Any regulation should recognize that the purpose of this separation is to help ensure that the theoretical potential for discriminatory activity will not materialize, and, if it should, would be easily detected.

Any reading of Section 272 beyond these limited principles would be inconsistent with the intent of Congress. The Commission must effectuate Congressional intent and refrain from adopting rules that are inconsistent with the plain language of the 1996 Act.

Furthermore, the Commission offers no justification in the NPRM for proposing more stringent separation rules than those that have been existence for fifteen years with respect to BOC provision of enhanced services. The Commission did not explain how BOC interLATA activities pose any different, much less greater, competitive risks than the concerns that originally prompted the Commission's enhanced services separation rules. The reason for that omission is readily

apparent: the Commission's rules have worked in the past, and more stringent rules simply are not needed.

II. THE PERSPECTIVE OF SECTION 272 OF THE 1996 ACT

A crucial consideration in this proceeding is the fact that Section 272 not only states express structural separation and antidiscrimination requirements but also provides an express authorization to joint market. Any construction of Section 272 that fails to permit joint marketing in an effective, efficient manner will deviate from Congressional intent. In the NPRM, the Commission lists a number of theoretical concerns about *potential* discriminatory activity. Each of these concerns was raised for consideration by Congress during the legislative process. Existing and new competitors of the BOCs urged that this *potential* activity be treated as actual conduct and that legislative solutions be adopted to assure these *potential* outcomes could not become reality.

In reality, past experience with regulatory activities in similar situations shows it is highly unlikely that these *potential* practices would become marketplace realities. In addition, these *potential* abuses virtually could not become marketplace realities without being observed and reported by competitors. The BOCs' competitors in the interLATA and information services markets are well-financed, highly profitable, observant, suspicious, and litigious entities that can be depended upon to identify and bring to the Commission's attention these discriminatory practices, should they occur. Indeed, the BOCs' competitors are themselves *potentially* capable of anticompetitive conduct.

While Congress could have left this potential of discrimination to be addressed through the enforcement of existing antitrust laws, it chose instead to entrust to the Commission the authority

to deal with such practices, should they occur.[6] The Commission was not authorized, however, to adopt rules and regulations as though theoretical possibilities were actual conduct.

A. CONSTRUCTION OF SECTION 272 OF THE 1996 ACT REQUIRES STRUCTURAL SEPARATION BUT PERMITS JOINT ACTIVITIES AND JOINT MARKETING

Section 272 contains all of the structural separation requirements to which BOC affiliates may be subjected in the provision of manufacturing, certain interLATA telecommunications services, and interLATA information services (other than electronic publishing, governed by Section 274, and alarm monitoring services, governed by Section 275). Section 272 contains only eight direct, unambiguous subsections. Nothing in the 1996 Act permits or requires the straightforward standards contained in this subsection to be a springboard for the Commission to adopt additional structural or non-structural requirements. The Commission's duty is to enforce the Congressional standards and to effectuate the 1996 Act's principles in support of competition, de-regulation, and the "opening [of] all telecommunications markets to competition."

1. Subsection (a) Simply Requires A Separate Affiliate

Section 272(a) requires the establishment of an affiliate separate from the BOC -- by definition, a local exchange carrier (LEC) services provider--for the provision of interLATA services and manufacturing. The intent of this subsection is simple and clear. Congress intended that BOCs should engage in in-region, interLATA services and manufacturing only through an affiliate separate from the affiliate that provides local exchange services.

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[6]The Commission clearly chose a deregulatory approach for LEC entry into the video marketplace. In its First Report and Order on OVS (FCC 96-249) "We believe that the best way to achieve Congress' goal is to given open video system operators the flexibility to enter and compete based on the demands of the marketplace."

2. Subsection (b) Establishes Structural and Transactional Requirements for the Separate Affiliate

In subsection (b), Congress clearly defines the degree of separation which is required of that affiliate or those affiliates which provide in-region interLATA and manufacturing services. These requirements are straightforward and limited in scope, ending with the requirement to reduce transactions with the BOC to writing and to make such writing available for public inspection. There is no statutory requirement for a Commission rulemaking to implement this subsection.

While Section 272 requires the separate affiliate to "operate independently" from the BOC itself, the separate affiliate is not required to "operate independently" from the BOC holding company or from any of its other subsidiaries or affiliates. Provided that it "operates independently" from the BOC itself, nothing in the 1996 Act limits the degree to which the Section 272 affiliate can interact with the BOC holding company or any non-LEC BOC affiliate or subsidiary. In addition, provided the arrangements are reduced to writing, the BOC affiliate may deal directly with the BOC. The Section 272 affiliate separation requirements are, therefore, significantly less restrictive than the Computer II separate subsidiary requirements.

3. Subsection (c) Establishes Nondiscrimination Safeguards

Existing and new competitors, while lobbying Congress regarding the 1996 Act, created a long list of potential anti-competitive, discriminatory activities that *might* be undertaken by the RBOCs. The Commission enumerated many of these same *potential* activities in the NPRM. Congress *was not persuaded* that these theoretical activities had occurred in the past or would develop into actual marketplace conduct. However, in an abundance of caution, Congress included in the Telecommunications Act of 1966 the prohibition against such acts and the recognition that,

should they occur, such discriminatory conduct would be contrary to the Act. Congress therefore gave the Commission the ability to deal with such conduct if the potential became reality.

Therefore, the purpose of subsection (c) is to enumerate the discriminatory activity that Congress wished to expressly prohibit. The fact that Congress enumerates the potential activity should in no way be interpreted to mean that Congress believed the activity existed or that it believed that the activity was likely to transpire. The subsection reflects that Congress had a great deal of confidence in the Commission's own vigilance and in the vigilance of the competitors; Congress also clearly recognized that many of the RBOCs would become competitors of other RBOCs. Congress believed it would be impossible for prohibited discriminatory activities to occur and remain undetected.

The fact that these activities are unlikely to occur and that, if they should, they would be immediately detected, contributed to Congress' belief that this extraordinary safeguard need be applied for only a very limited duration of time.

4. Subsection (d) Provides for a Biennial Audit

As this bill was being lobbied in Congress, and as Congress showed no sign of being persuaded that the RBOCs would willfully engage in illegal (i.e., discriminatory) activities, Congress chose not to require more draconian measures than the provisions included in the plain language of Section 272. Parties suggested, however, that it was important for the Commission and the State regulators to have adequate authority to review the transactions between the affiliate providing local exchange carrier service and the affiliate or affiliates providing in-region interLATA services and manufacturing.

In this subsection, Congress detailed the extent of the audit authority, how that authority should be exercised, and what requirements the affiliate or affiliates must comply with in assisting regulators as these audits are performed. The fact that Congress laid out in such detail the requirement for these audits should not be read as an invitation for the Commission to be more intrusive. To the contrary, Congress does not invite or suggest that the Commission undertake whatever additional activities it believes are necessary to meet these requirements. The subsection specifically identifies and limits the activities which should occur.

5. Subsection (e) Provides Instructions for the Separate Affiliate and the BOC in Responding to Certain Requests

This subsection is complimentary to Subsection (c) and provides more detail on precisely what the affiliate providing local exchange carrier services must do in conducting activities with the affiliate or affiliates providing in-region interLATA service and manufacturing. Once again, Congress was urged to include many more activities and requirements. The fact that these four specific areas are enumerated is not an invitation for the Commission to add more paragraphs. The clear language is intended to limit and define the activities that the Commission should undertake and review. Either through its own activities (i.e., the biennial reviews) or through the complaint process (i.e., a competitor observing discriminatory activity and bringing it to the attention of the Commission), the Commission should apply these standards in determining what is the appropriate reaction to the alleged discrimination.

6. Congress Expressly Provided for Sunset of the Separate Affiliate Requirement

Subsection (f) makes it very clear that Congress intended for the separate subsidiary requirement to be limited in duration and should reflect the fact that Congress did not believe it likely that potential discriminatory activity would become actual conduct. If Congress had been persuaded that the potential activities identified in the NPRM were likely to become actual conduct and that those activities could remain undetected, Congress would have included more instructions--either in its own legislative language or by requiring the Commission to adopt additional rules and regulations. Congress also would not have limited this requirement to a three-year period.

The Commission should fully understand that the intent of Congress was for this separate subsidiary requirement not only to be of short duration but also to be as *deregulatory* and as nonburdensome as possible. Congress recognized that placing regulatory and anticompetitive burdens on the RBOCs would damage the marketplace and competition.

7. Congress Expressly Allowed Joint Marketing

As this legislation was lobbied by the parties, it became apparent that competitors and potential competitors of the RBOCs would use the requirements of Section 272 as a competitive tool and would argue to the Commission that one of the requirements included in the prohibited activity should be that the affiliate providing local exchange carrier service not be permitted to joint market those services with the services of an in-region interLATA long distance. As this became apparent during the lobbying process, Subsection (g) was added by Congress to make it abundantly clear that this particular activity would not be considered discriminatory and, therefore, is permitted under the Act.

Any contrary suggestions would fly directly in the fact of both the plain language of the legislation and the intent of Congress.

8. Subsection (h) Provides Transition Rules

The inclusion of this subsection in the 1996 Act strongly indicates meant for Section 272 to be the final word concerning structural safeguards. Congress apparently did not intend for the Commission to adopt additional rules and regulations other than those that it explicitly included in Section 272.

Specifically, Congress recognized it was possible that an RBOC could be providing an in-region interLATA long distance service and/or be engaged in manufacturing (fabrication) prior to adoption of the Act without a separate affiliate requirement. In order to address that contingency, Congress laid out a timetable that requires the RBOC to bring its activity into consistency with Section 272(b).

B. JOINT MARKETING IS PERMITTED UNDER THE 1996 ACT

The structural separation discussion within the NPRM is inconsistent with Congress' intent to permit the BOCs to joint market services provided by required separate subsidiaries. Even when competitors of the BOCs attempt to use the requirements of Section 272 as an anti-competitive tool and argued the Commission to prohibit joint marketing, in their lobbying efforts. Congress deliberately added Subsection (g) to make it abundantly clear that this particular activity would not be considered discriminatory and, therefore, would be permitted under the Act. Any contrary suggestion would fly directly in the face of both the plain language of the legislation and the intent of Congress.

Nevertheless, in the NPRM, the Commission hearkens back to restrictive regulations promulgated in its Computer I and Computer II Orders, both of which are more than 15 years old and based on many premises the Commission rejected in Computer III. In brief, Congress expected the Commission to look for ways *increase* competition within the burgeoning telecommunications market, not simply to revisit its history and to apply its old rules to a fundamentally-changed industry. Moreover, neither Computer I nor Computer II were issued in the context of the 1996 Act, and neither can be considered consistent with Congress' view that the 1996 Act was necessary to *accelerate* changes in the industry.

The Commission has accepted the premise that consumers need the ability to acquire and pay for telecommunications services in a simple "one-stop" manner.[7] The 1996 Act directs that BOCs and other service providers be able to provide such "one-stop" service via joint marketing.[8] The benefits of "one-stop" are obvious: many consumers want to be able to order and pay for telecommunications services quickly and easily, once they have made an educated choice on who their provider will be. Consumers expect such treatment in these days of direct-mail catalogs, bank-by-phone, ticketless airline travel, and in-home pay-per-view entertainment. These expectations are

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[7]NPRM at ¶ 6. See also MCI News Release. MCI may be the first company to provide such an integrated package, although local service is not yet part of its package, called MCI ONE. According to its own news release, MCI will offer long distance, cellular, paging Internet access email, a calling card, home security, and a personal 800 number service. All services will be integrated using an "intelligent network," according to MCI. A perssonal computer can also be ordered through MCI, to be delivered to the customer's home or office, with a tutorial available. Customers of MCI One will receive one bill for all services and have one phone number to call for service. See http://www.webcome.com/longdist/68/68-2.html.

[8] Joint marketing will be permitted once a BOC receives in-region relief, although some carriers will be permitted to joint market prior to that time. See Sections 271(e) and 271(g)(2).

shared by the mainstream populace, not just those who "surf the Internet." One phone call is what consumers expect to make to order goods or services, and those providers that require anything less convenient should expect their sales to drop correspondingly. At issue is whether the Commission's rules will acknowledge and respect consumer (and Congressional) expectations, or whether the Commission will dictate that consumers make 'multiple stops' to acquire the telecommunications services they desire, under the guise of insuring that distinct corporate entities can only be considered sufficiently separate if they meet standards set by the Commission in 1980 in the context of the nascent computer industry.

Any BOC-specific prohibition that would prevent one-stop joint marketing and related "back-office" coordination among distinct service providers would reduce the number of attractive choices available to consumers. Any separation requirements that result in preventing BOCs from providing an MCI One-type service will only serve to make the telecommunications markets less competitive--as the BOCs will be unable to compete for customers as non-BOCs will. Creating such a semi-competitive industry would clearly be contrary to both the literal words within the 1996 Act as well as the intent of Congress.

C. THE COMMISSION HAS REPEATEDLY EXPRESSED CONFIDENCE IN ITS SAFEGUARDS

Overall, the Commission's collective safeguards have proven sufficient to allay discrimination concerns in the new competitive environment. These Commission's non-structural safeguards have worked well for LECs for over eight years and can continue to work well in the structures required by the 1996 Act.

The affiliate transaction and cost allocation rules and safeguards, too, have been tested and affirmed through numerous Commission orders and in actual use for over eight years. These rules were deemed adequate by the Commission in the 1987 Joint Cost Order, refined in the various CAM approval orders since 1988, and reaffirmed as working well in 1991 in the conclusion reached in the Computer III Remand Proceedings.[9] As an example of this affirmation, the Commission examined the use of the in-depth reporting of individual BOC's actual allocations of costs, as required by the ARMIS reports, and concluded that claims that such reporting would not enable detection of subtle cross-subsidies were unsupported.[10] The Commission further confirmed that it had sufficient resources to monitor the BOCs' activities under the existing rules and cited its enforcement actions against NYNEX as "an example supporting the efficacy of our affiliate transaction rules."[11]

These rules are more than sufficient to allay any concerns about cross-subsidy.[12] The Commission was correct in concluding in the BOC Safeguard Order that "[a] technologically innovative and economically efficient telecommunications infrastructure is central to continued

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[9] In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd. 7571, 7591-7597 (1991) ("BOC Safeguards Order").

[10] Id. 6 FCC Fcd at 7595.

[11] Computer III Remand, paragraph 54.

[12] SBC strongly urges the Commission to consider whether the accounting safeguards are required in light of price cap regulation (without sharing for SWBT) and in light of the inability of a price cap BOC to pass along increased costs. This consideration also holds true in the state jurisdictions where price cap and other incentive regulation forecloses the automatic recovery of increased costs. Further, the explosion in competition affords no opportunity for such anti-competitive behavior, since increased prices would play against the BOC's ability to be competitive. Absent the elimination of such rules, the Commission should further explore the streamlining of these rules in CC Docket No. 96-150.

United States prominence in an increasingly information-oriented global economy. We should remove unnecessary regulatory barriers that impede the responsiveness of American companies to market place incentives that foster increasing use and advancement of the [nation's] telecommunications assets."[13] The Commission further concluded that "Our experience over the last ten years demonstrates that removal of structural separation requirements has resulted and will result in greater BOC participation in the provision of enhanced services. . . . In the relatively brief time that the BOCs have been permitted to provide that service [voice mail], voice mail has been provided to rapidly increasing numbers of customers in their regions at reasonable prices. . . . By contrast, our experience with structural separation shows that it inhibits BOC provision of enhanced services. . . we have adopted and implemented a comprehensive regulatory framework that provides an effective alternative to structural separation for protection against anticompetitive conduct."[14] Particularly in concert with Section 272's structural separation requirements for the affiliate, the non-structural safeguards applicable to the BOCs should continue to be effective.

D. AUDITS DEMONSTRATE THAT THE COMMISSION'S EXISTING SAFEGUARDS PREVENT SUBSIDY AND DISCRIMINATION.

The Commission has performed audits of affiliate transactions in all BOCs. In fact, the Commission cited in the Computer Inquiry III Remand Proceeding the audit of NYNEX and the issues surrounding that enforcement proceeding that proved the efficacy of the existing affiliate transaction rules.[15] Further, the Commission has audited SWBT affiliate transactions in a Joint Staff

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[13] Computer III Remand, paragraph 2.

[14] Id. paragraphs 7-9.

[15] Computer Inquiry III Remand Proceeding, para 54.

Audit. Although issues from the audit remain under discussion, the audit report clearly expresses an ability to audit affiliate transactions based on the rules and demonstrates that although there are differences in opinion on the specific definition of certain cost allocation issues, for the vast majority of SWBT affiliate transactions audited there were no issues. Further the items at issue represent less than one-half of one percent of SWBT's operating expense for the four-year audit period. As the Commission noted in the Computer Inquiry III Remand, "We conclude our comprehensive system of cost accounting safeguards has worked well and as strengthened, protects ratepayers against cross subsidization by the BOCs."

In adopting its Computer III affiliate transaction rules, the Commission opined that the application of an allocation allowed the customers benefit from the economies of scale and scope for services that were provided in a common manner and for which costs were allocated based on the prescribed rules.[16]

The Commission has had twenty years of experience with the impact of full structural separations requirements for competitive or enhanced services versus the use of nonstructural safeguards in the regulation of such services. Specifically, in the Computer III Remand Proceeding, CC Docket No. 90-623, released December 20, 1991, the Commission strongly acknowledged that the elimination of full structural separation and the implementation of nonstructural safeguards was in the public interest because of the prospect of greater BOC participation in the provision of new

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[16] Joint Cost Order, 2 FCC Rcd at 1335-1336; Joint Cost Recon. Order, 2 FCC Rcd at 6296-97. In addition, in a recent order in WT Docket No. 96-162, Implementation of Section 601(d), the Commission concedes that in a competitive environment, such efficiencies would promote higher quality, lower-cost service to subscribers. (¶ 48 FCC 96-319).

enhanced services. In the brief time that BOCs had been allowed to offer voice mail services without full structural separation, that service had been provided to a rapidly increasing number of customers. The full structural separation requirement was found to impose a cost burden of up to 68% or higher which resulted in higher costs to the consumer for those services. (Para. 8).[17] For SBC to provide the same service with full structural separation, that is no joint marketing or sharing of administrative services, would increase the voice messaging service cost by 78% and result in an uneconomic business, and the loss of this product to the mass market. The result of structural separation was a loss of efficiency and economies of scope that nonstructural safeguards afford.

E. BOC AFFILIATES SHOULD BE PERMITTED TO PARTICIPATE, AS DO ALL OTHER CARRIERS, ON A NON-DOMINANT BASIS

Consumer benefits cannot be expected to increase if BOC affiliate entry into interLATA markets is hampered by the numerous regulatory restrictions accompanying their potential classification as dominant carriers. Requiring BOCs to comply with lengthy tariff proceedings provides competitors the opportunity to obtain valuable cost and planning information. Such sensitive information will enable other suppliers to undermine legitimate BOC affiliate competitive strategies. Knowing BOC affiliate cost structures and pricing plans, competitors will be able to identify market niches, assemble service packages, develop pricing plans, or otherwise render ineffective attempts to compete vigorously in interLATA markets. Lacking convincing economic arguments, it would seem difficult to justify regulatory decisions to impede the ability of BOC affiliates to fairly compete in interLATA markets, thereby denying the additional consumer benefits that would result from such competitive efforts.

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[17] SWBT Reply Comments, CC Docket No. 95-20, page 18, May 18, 1995.

Absent an established customer base, BOC affiliates entering interLATA markets will not possess market power nor be able to effectively manipulate market prices. If interLATA markets are currently deemed competitive, removing regulatory and legal barriers to BOC affiliate entry will not lead to market failure. Supply and demand elasticities are presumably sufficiently high to preclude any one firm, or small group of firms, from controlling market prices to the detriment of consumers. Consumers, particularly large businesses, are sophisticated and flexible enough to switch suppliers if one (or a few) attempt to raise prices significantly. Further, numerous suppliers have sufficient network capacity to accommodate increased consumer demand. BOC affiliate participation in these markets will serve only to increase available network capacity and add alternatives to the array of suppliers already available to consumers.

Congress' intent in enacting the 1996 Act was to facilitate the entry of competitors into both the local exchange market and the interexchange market as well. To the extent that the Commission's potential dominant carrier regulations delay or impede a BOC affiliate's efficient provision of interexchange services after it is permitted to offer services through completion of the Section 251, 252, 271, and 272 requirements, they are contrary to Congressional intent and anticompetitive in result. The Commission should not, therefore, regulate separate BOC affiliates as dominant in their provision of interstate, interexchange services.

F. COMMISSION IMPOSITION OF DOMINANT CARRIER REGULATION WOULD BE INCONSISTENT WITH THE ACT BECAUSE IT WOULD SERVE ONLY TO DIMINISH COMPETITION

The Commission asks whether it should apply dominant carrier regulation to structurally separated BOC affiliates providing in-region, interLATA services.[18] To do so would defy logic. The Commission's concern about anticompetitive conduct is based upon the potential that the BOCs might improperly use their obligation to connect calls that are terminated in their own regions as their structurally separated affiliates begin to provide out-of-region long-distance service. However, BOCs' local exchange services are subject to the Commission's well-established and carefully policed equal access and non-discrimination safeguards.[19] Further, BOCs' local exchange services are now subject to the interconnection requirements of Section 251 and the newly-adopted Commission rules that mandate an opening of the local exchange network. Any contention that BOCs could discriminate in favor of their separated affiliates in light of these safeguards is not correct.

As a practical matter, there are several reasons why BOCs cannot discriminate, as follows:[20]

(1) A BOC cannot easily or economically identify calls that originate with its interexchange competitors in markets in which the BOC affiliate operates as an interexchange carrier from calls originating in markets in which it does not.

(2) The BOCs have no incentive to degrade the quality of access service offered to interexchange carriers as they face access and local exchange competition.

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[18] NPRM at Section VIII, paragraph 108, p. 53.

[19] See, e.g., Fifth Report and Order, 98 F.C.C. 2d 1191, at text accompanying notes 11 and 12; 47 U.S.C. §§ 201, 202.

[20] See discussion, supra.

(3) BOCs cannot degrade access service without detection by the IXC customers, most of whom are known for their ability to litigate perceived wrongs inflicted by BOCs.

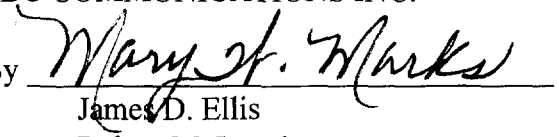
Regulating BOC affiliates as dominant carriers, particularly at a time that no other IXC is regulated under the Commission's dominant carrier rules, assures that BOC affiliates will not be allowed to compete against to their entrenched competitors.

III. CONCLUSION

Rather than promulgating regulations that create policies Congress neither wrote nor intended, the Commission must give the intended effect to the words of Section 272. In the first instance, this means that the Commission need not write rules, but should simply enforce the separation and non-discrimination provisions of that Section. The 1996 Act, which was whole and balanced to reflect the compromises that accompanied the enactment of landmark legislation on February 8, 1996, should not be interpreted in ways that Congress did not intend. A balanced reading of Section 272's separate affiliate, non-discrimination, and joint marketing provisions will permit BOCs and their affiliates to compete on an equal basis with competitors. Finally, the Commission must not impose on the BOC-affiliated interLATA affiliates a dominant carrier regime to which no others are subjected.

If the Commission continues to strain to find ways to constrict BOC ability to compete in the interLATA market and in other competitive markets, the result will be decidedly *anticompetitive*, in direct contravention of the whole purpose of the 1996 Act. The BOCs' rivals do not need such regulatory assistance in order to compete, nor did Congress intend for such assistance to be given them.

Respectfully Submitted,
SBC COMMUNICATIONS INC.

By 

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